United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

original

77-7182

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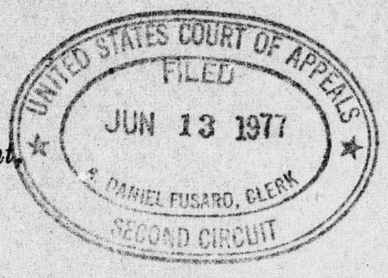
FOR THE SECOND CIRCUIT



ERIC E. SMITH,

Plaintiff-Appellant,

—v.—

AMERICAN PRESIDENT LINES, LTD., and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO,

Defendants-Appellees.

SRL

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE, AMERICAN PRESIDENT LINES, LTD.

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STATEMENT OF ISSUES

1. Whether Appellant filed his charge of alleged discrimination within 300 days of the act of discrimination as required by Section 706(e) of the Civil Rights Act of 1964, as amended in 1972, 42 USC §2000e-5(e).

2. Whether the statutory period can be tolled.

RELEVANT STATUTE

Section 706(e), 42 U.S.C. 8-2000-5(e), provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, ... [Emphasis added.]

PROCEEDINGS BELOW

On May 28, 1975, Appellant filed his Complaint in the above-entitled case. In so doing, Appellant asserted that the Court had jurisdiction over his claim under the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000(e) et. seq., the Civil Rights Act of 1866, 42 U.S.C. §1981, and the Labor Management Relations Act, 29 U.S.C. §151 et. seq. On August 18, 1976, Appellee filed a Motion to Dismiss or in the Alternative for Summary Judgment contending that jurisdiction did not lie under any of the above-enumerated Acts. Appellee contended, inter alia, that the Appellant had failed to meet the statutory time period in Section 706(e), 42 U.S.C. §2000e-5(e) which provides for the jurisdictional time period where a complaint has been filed with a State agency of three hundred days after the alleged unlawful act or thirty days after receiving notice from the State, "whichever is earlier".

The District Court on December 13, 1971, granted Appellee's Motion in other respects, but denied it in regard to the Section 706(e) argument since the Court believed Appellant had met the 30-day requirement. The Court, in reaching this conclusion had read the 300 and 30 days as being in the conjunctive and had inadvertently ignored the qualifying reference to "whichever is earlier". On December 20, 1976, Appellee moved the District Court to reconsider both on the grounds that the Court erred in

ignoring the qualifying language and that Appellee had not in any event met the 30-day requirement. On January 24, 1977, the District Court set aside its earlier determination and held for Appellee on the ground that since the Charge "was filed in excess of 300 days after his termination, [Appellant] has not satisfied the time limits in 42 U.S.C. §2000e-5(e)." It is from this judgement that Appellant appeals.

STATEMENT OF FACTS

On June 8, 1970, Appellant commenced work on Appellee's ship, the S. S. President Pierce. A. 3. On October 6, 1970, Appellee filed a complaint with the United States Coast Guard. A. 69. On October 14, 1970, Appellant filed a charge of discrimination with the New York State Division of Human Rights (hereinafter NYSDHR). A. 48. On September 17, 1971, the NYSDHR issued its opinion finding, inter alia, that Appellant had not been discriminated against in regard to his discharge. A. 83. On September 30, 1971, Appellant appealed the decision. A. 85. On December 4, 1976, the NYSDHR informed Appellant that his rights under the New York Human Rights Act had been exhausted. A. 45.

In addition to the charges filed with NYSDHR, Appellee also filed charges with the federal Equal Employment Opportunity Commission. A. 41-44.

The EEOC New York District Office file contains three charges filed by Appellant alleging discrimination against him by Appellee. The first two charges are dated November 19, 1971. A.41,42. The EEOC's files indicate that no case file number was assigned to either of these charges and neither was served upon Appellee American President Lines. A. 49. The third charge found in the EEOC's files is dated November 24, 1972. A. 44. This charge bears

EEOC No. TNY2-0491. Although Section 706(b) of the Civil Rights Act requires that defendant be informed within 10 days after the filing of the charge, no such notice was filed on Appellee. Instead on March 8, 1973, the EEOC informed Appellee of the charge in a letter requesting certain information in regard thereto. A. 49. Unfortunately, the actual charge was not sent to Appellee. A. 21. In fact, Appellee has never received officially a Notice of Charge in this case although subsequent to March 8, 1973, it did obtain a copy of the Notice. A. 21.

The first of these charges is dated "Nov. 19 1971." A. 41. In response to the question "The most recent date on which this discrimination took place", Appellant had written "Oct. 5 1970". There is a second charge containing two pages, the first page being dated "Nov. 19, 1971" and the second page dated "11-19-71". A. 42. Both pages of the second charge refer to the discrimination as having taken place as of September 18, 1970. A.42,43. The second page refers not only to harassment on the voyage ending October 5 but termination "at the end of the voyage on Oct. 6th, 1970". The third charge is dated "Nov. 24, 1972". A. 44. Other than his termination, which occurred on or before October 6, 1970, there was no reference in the charge to any other act of discrimination. A. 44. All three refer to Appellee's discharge. A.41-44. None involved Appellee's filing of its complaint with the United States Coast Guard and none involved the failure of Appellee to post the required EEOC notice.

The Complaint in paragraph 6 alleges four separate acts of discrimination. A. 29. The first, subparagraph A, alleges that Appellant was discharged on October 5, 1970. Thus, in regard to this subparagraph, the last act of discrimination alleged occurred on October 5, 1970. The second act of discrimination in subparagraph B involves harassment on the voyage on which Appellant was terminated. Since the harassment could not have occurred after his termination, the last act of discrimination could not have occurred later than October 5, 1970. Subparagraphs C and D refer to charges filed with the United States Coast Guard by Appellee. (These were not included in Appellant's charges with the EEOC.). Subparagraph C refers to the incompetence of Appellant while subparagraph D refers to his misconduct. The charge filed by Appellant occurred on October 6, 1970. Assuming arguendo that the filing with a governmental agency constituted an act of discrimination, the last act would have occurred on October 6, 1970. On page 8 of his brief, Appellant contends that the last act of alleged discrimination did not occur until September 2, 1971, when the Coast Guard dismissed Appellant's charges against Appellee. However, this was not raised in the Complaint nor even in the pleadings properly filed with the Court. It first arose in a pleading filed on January 11, 1977, which Appellant conceded was not timely filed. A. 144.

ARGUMENT

I. APPELLANT DID NOT FILE HIS CHARGE WITHIN 300 DAYS OF THE ACT OF DISCRIMINATION AS REQUIRED BY SECTION 706(e) OF THE CIVIL RIGHTS ACT.

Section 706(e) of the Civil Rights Act requires that a charge of discrimination be filed within 180 days after the alleged unlawful employment practice has occurred. An exception to this requirement is found where the person aggrieved has initiated proceedings with a state agency. In these circumstances, "Such charge shall be filed by or on behalf of the person aggrieved within 300 days after the alleged unlawful employment practice occurred".

Applying Section 706(e) to the above facts, it is clear that Appellant did not file his charge of discrimination within 300 days of the acts of discrimination. The last act of discrimination based on the charge and the Complaint occurred October 6, 1970. Davidson v. Topley, 11 FEP 573 (S.D.N.Y. 1975). Three hundred days from October 6, 1970, is August 1, 1971. In this case a formal charge, as evidenced by a docket number, did not occur until November 24, 1972, more than 15 months after the statutory period had expired. Even if the earlier November 19, 1971, date was used, this would be over 2 1/2 months after the statutory time expired. However, Appellee was not notified of the charge until March 8, 1973, and never was served a copy of it. Obviously, if the date on which Appellee was first informed of the charge

was used, this would be 17 months after the statutory time had expired. Thus, no matter what standard of measurement is used, the time for filing the charge had expired and in the instant case must be dismissed. White v. Texaco, 7 FEP 367 (S.D.N.Y. 1973); Hecht v. CARE, 351 F. Supp. 305, 310 (S.D.N.Y. 1972).

Appellant does not appear to dispute the argument that if the discriminatory acts occurred on or before October 6, 1970, his charge was untimely filed. Instead Appellant contends on page 8 of its brief that the discrimination was continuing and that it did not come to rest until September 2, 1971. Appellant does not contend that Appellee committed any act after October 6, 1970. Instead it argues that, although Appellee filed its charges with the Coast Guard on October 5, 1970, the Coast Guard did not dismiss the charges until September 2, 1971. A. 70. There are several difficulties with this.

A. Appellant's Argument is Untimely.

The use of the end of the Coast Guard investigation as a reference point was not raised until January 11, 1977, in a pleading which Appellant admitted was not timely. Furthermore, the allegation was not part of its Complaint to this Court or its charge to the EEOC.

As noted above, the Complaint in paragraph 6 refers to the filing of charges with the United States Coast Guard. It did not refer to any subsequent hearing even though the

charges themselves were filed only one month after the hearing was completed. Appellant is attempting by its present pleading to, in fact, amend its Complaint. Appellant cannot raise legal arguments after the proceedings have commenced except in a manner consistent with normal rules of pleading. See Mt. Health City School District v. Doyle, 97 Sup. Ct. 568, 571 (January 11, 1977).

B. The Argument is Beyond the Scope of the Charge with the EEOC and the Complaint in this Proceeding.

The Complaint insofar as it refers to Complaints made with the United States Coast Guard by Appellee is beyond the scope of the charge. All three charges filed with the EEOC by Appellant relate to events leading up to and including Appellant's termination on October 6, 1970. At no time did Appellant ever charge Appellee with the discrimination because of the Appellee's filing of charges with the United States Coast Guard. This occurred despite the fact he had ample opportunity to do so. In Smith v. United Press International, 8 FEP 886, 890 (S.D.N.Y. 1974), the Court held that an individual may not allege in a Title VII action a claim not presented to the EEOC. Since any claim based on Appellee's filing of the Complaints with the United States Coast Guard was not filed with the EEOC, this matter is beyond the scope of the Complaint in this case and cannot be considered in regard to the timeliness

of the filing of the charge. See United Air Lines v. Evans, ___ U.S. ___, 14 FEP 1510, 1512 (1977). Moreover, the Complaint in this case refers to the filing of charges with the Coast Guard, and not the subsequent investigation of them as the discriminatory act.

C. The Decision of the Coast Guard is Res Judicata.

Although the Coast Guard found that while the evidence did not support Appellant's misconduct or incompetence, it also held that Appellee was not improperly motivated by racial prejudice in filing the charges. A. 75. The decision of the Coast Guard rejecting Appellant's claim that Appellee was discriminatorily motivated when it filed charges with it, should be res judicata. See Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). While this Court of Appeals has held that the res judicata doctrine was not applicable to an action arising under Title VII of the Civil Rights Act where the prior action was a state proceeding, it has not ruled on its applicability where the second proceeding involved another agency of the United States government.

D. The Date of Appellee's Complaints Filed with the Coast Guard is the Controlling Date.

Even assuming Appellant can timely raise the issue of the Coast Guard Complaints, the alleged act of discrimination occurred on October 6, 1970, and not September 2, 1971. The filing of charges by Appellee against Appellant

occurred on October 6, 1970. The filing of the Complaint was a singular act which was completed on a given date, October 6, 1970. That the October 6, 1970, date is the correct one is supported by two recent decisions of the Supreme Court. In Electrical Workers v. Robbins and Myers, 429 U.S. 229, 97 Sup. Ct. 441 (1976), the Plaintiff argued that the date governing the timeliness of his charge was not his termination but the date on which the arbitration hearing on the termination was completed. The Supreme Court disagreed and held that it was the date of the discharge and not the subsequent date of the hearing that controlled. In the second case, United Air Lines v. Evans, ___ U.S. ___, 14 FEP 1510 1512 (1977), the Supreme Court held that a discriminatory act which is not the subject of a timely charge cannot be used to provide jurisdiction even though there might be a discriminatory impact in the present. Under the Robbins and Myers case, it is clear that any discrimination in the instant proceeding is determined by the filing of and not the subsequent hearing on the charges with the Coast Guard. Under the Evans case, the failure of Appellant to timely protest the filing of the charge prevents it from contending that the decision rendered after that date had a discriminatory impact. It should be noted that since the Coast Guard did dismiss the charges there was no discriminatory impact in any event.

E. Even if the September 2, 1971, Date is the Controlling Date, the Complaint is Untimely.

Section 706(e) of the Civil Rights Act, 42 U.S.C. §2000-5(e) requires that a charge filed with the EEOC must be filed within three hundred days after the discriminatory act or thirty days after receiving notice from that state agency "whichever is earlier". The decision of the New York State Division of Human Rights was issued on September 17, 1971. If the charge is deemed filed on November 19, 1971, this is more than thirty days beyond the state agency's decision and still would be untimely. If the charge is considered to have been filed no earlier than March 8, 1973, (See Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973)), neither time period found in Section 706(e) would have been met.

II. SECTION 706(e) OF THE CIVIL RIGHTS ACT IS JURISDICTIONAL AND CANNOT BE TOLLED.

Appellant asserts that the statutory time period found in Section 706(e) is not jurisdictional and that it can be tolled by equitable consideration. Applying this supposed principle, Appellant argued that the period was tolled because

> at no time during his presence on the company's ship in 1970 and at no time during his periodic and frequent visits to his union offices - continuing to August 20, 1976 - has he seen a notice posted advising employees and union members that if they feel they have been discriminated against on account of their race or other prohibited bases, they should file charges with the EEOC.
>
> A. 53,54.

It is Appellee's position that the statutory period is jurisdictional and that even if it were not the alleged failure to post would not constitute an equitable ground in which to toll the running of the statute.

There exists a long line of cases holding that the limitation periods in the Civil Rights Acts are jurisdictional, e.g., Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975); Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir. 1973); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973); Goodman v. City Products, 425 F.2d 702 (6th Cir. 1970); Huston v. General Motors, 477 F.2d 1003 (8th Cir. 1973); Stebbins v. Nationwide Insurance Co., 469 F.2d 268 (4th Cir. 1972); Cleveland v. Douglas Aircraft, 509 F.2d 1027 (9th Cir. 1975); Harris v. National Tea, 454 F.2d 307 (7th Cir. 1971); Hinton v. CPC International, 520 F.2d 1312, 10 FEP 1423 (8th Cir. 1975); Smith v. OEO For Arkansas, 13 FEP 132 (8th Cir. 1976). This is also the thrust of the Supreme Court decisions in McDonnell Douglas v. Green, 411 U.S. 792, 798 (1973); Johnson v. Railway Express, 421 U.S. 454 (1975); Electrical Workers v. Robbins and Myers, 429 U.S. 229, 239-240, 97 Sup. Ct. 441, 447-449 (1976); and United Air Lines v. Evans, ___ U.S. ___, 14 FEP 1510, 1511-1512 (1977). Plaintiff cites only one Court of Appeals decision under Title VII of the Civil Rights Act to the contrary, Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975). The Court of Appeals

for the Sixth Circuit in Guy v. Robbins and Myers, 525 F.2d 124 (6th Cir. 1975) stated:

> In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court ruled that the adverse decision of an arbitrator did not foreclose resort by the grievant to her federal remedy. The reasoning of the Court in that opinion supports the proposition that the filing of a grievance under a collective bargaining agreement does not toll the limitation period of an applicable federal or state statute. The Court pointed out that in seeking relief under Title VII, the employee was not seeking to review an arbitrator's decision, but was asserting an independent right. In Johnson v. Railway Express Agency, Inc., 43 LW 4623 (1975), the Court held that the various remedies available to aggrieved employees are 'separate, distinct and independent.' It would be utterly inconsistent with the thesis of these two opinions to hold that the pursuit of any of these remedies operates to toll other remedies that the employee has the right to resort to concurrently.

This decision in this regard was affirmed by the Supreme Court in Electrical Workers v. Robbins and Myers, supra. In so doing, the Supreme Court specifically rejected the argument that "equitable tolling principles should be applied" by stating

> But the principle answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it extablished a 90-day limitation and gave no indication that it considered a slight delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision', Congress did not leave to court the decision as to which delays might or might not be slight.
>
> 97 Sup. Ct. at 448-449.

In United Air Lines v. Evans, ___ U.S. ___, 14 FEP 1510, 1511 (1977), the Supreme Court once again asserted that the "timely filing is a prerequisite to the maintenance of a Title VII action." It further declared:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

The Supreme Court decisions, supra, are dispositive that the statutory time periods in Section 706(e) are jurisdictional in nature and cannot be tolled.

Even assuming the statutory time periods are not jurisdictional in nature, Appellant has set forth no equitable ground for extending the time period beyond the 300 days. Appellant contends on page 15 of his brief that because he did not "see" the EEOC notice and because Appellee did not make Appellant "aware" of his rights through the required posting of notices, he would be entitled to an extension of time. It must be noted that Appellant did not file a charge claiming that Appellee did not post the required notice. Under the Evans case, supra, this alone should be sufficient grounds for dismissing this argument.

Moreover, there is no case holding that the posting or non-posting of various government notices acts as a waiver of any statutory time period. In fact, the opposite could be said to be true, see Aarid Van Lines, Inc., 22 WH 1189, 1190, Fn. 1 (U.S. Dept. of Labor 1976). Ignorance of the law has long been held not to excuse compliance with statutory time periods, c.f., Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975). In Skoalund v. Singer Co., 13 FEP 253 (D. N.H. 1975), the Court stated that plaintiff should have known his rights under the age discrimination law and that "he cannot now claim that his ignorance is due solely to defendant's alleged failure to post notice of ADEA as required by 29 U.S.C. §627."

In this case, Appellant does not explain why he was unaware of the Civil Rights Act. It is highly unlikely that Appellant, who has been engaged in numerous litigations and who was aware of his rights under the New York Human Rights Law, would be unaware of the federal civil rights law. This lack of knowledge is particularly astounding when Appellant admitted in Deposition that he was in the United States when the Civil Rights Act was passed, that he regularly reads New York newspapers and national magazines and watches television, including newscasts. A. 149. Furthermore, Appellant claims he has never seen an EEOC notice on any ship he has been on, not just that of Appellee. A. 149. There is nothing in

the Complaint indicating that in any way Appellee "prevented" Appellant from filing the charge. At most, even if Appellant's highly preposterous facts are accepted as true (and they are denied by Appellee), there merely exists an omission on Appellee's behalf and not any deliberate act preventing Appellant from taking any action which would require the tolling of the statute.

CONCLUSION

For all the aforegoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vincent J. Lynch, attorney for Appellee, American President Lines, Ltd., hereby certify that I have served copies of the foregoing Brief of Appellee upon counsel for the Appellant and Appellee, Marine Engineers' Beneficial Association, by causing two copies each of same to be placed in the U.S. Mail, postage prepaid, addressed to them, this 13th day of June, 1977.

Vincent J. Lynch